COMMENT

OHIO SOVEREIGN IMMUNITY: LONG LIVES THE KING

> It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.[1]

Sovereign immunity, born at a time when monarchs ruled by divine right, has little to sustain its continued existence but legislative and judicial inertia. Commentators with surprising unanimity have attacked this archaic doctrine from every quarter. Despite these repeated assaults, the doctrine retains its vitality in most jurisdictions. The purpose of this comment is twofold: (1) to set out the Ohio position on sovereign immunity, and (2) to propose a step, a modest one to be sure, toward abolition of sovereign immunity in Ohio.

INTRODUCTION

The roots of sovereign immunity have been traced to Roman antiquity, but the most frequent form in which this doctrine finds expression is in the English maxim, "The King can do no wrong." It is doubtful whether anyone ever really believed that the king could do no wrong, though Blackstone wrote, "The king, moreover is not only incapable of doing wrong, but even of thinking wrong . . . ."[2] The real basis of the king's immunity from suit was the impossibility of enforcing a judgment against him.[3] Thus, the ancient maxim might more accurately be phrased, "The King cannot be held to account for his wrongs."

How could a doctrine so discordant with American notions of responsible government be accepted as a part of our common law? The answer rests more in terms of dollars and cents than in any legalistic distinction. The colonial governments had contracted huge debts in the prosecution of the Revolutionary War and in the formation of their respective governments. A suit at the instance of each of the newly formed states' creditors would be disastrous to the states' economy.

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1 Statement by President Lincoln quoted in 6 Richardson, Messages and Papers of the Presidents 51 (1897).

2 1 Blackstone, Commentaries* 239.

3 "For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, . . . shall command the king?" 1 Blackstone, Commentaries* 235.

The states were understandably interested in the interpretation of article III, section 2 of the Constitution which provides that, "the judicial power (of the United States) shall extend . . . to controversies . . . between a State and Citizens of another State." Hamilton argued that the sovereign immunity of the states would not be abolished by this section.

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.[4]

Much to the alarm of the states this view was rejected in the famous case of *Chisholm v. Georgia*[5] which held that a citizen of one state could sue another state in assumpsit in the federal courts. The eleventh amendment, which overruled the result of the *Chisholm* case, was immediately proposed and ratified: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

In *Hans v. Louisiana*,[6] the Supreme Court held that the jurisdiction of the federal courts did not extend to cases in which a state was being sued by one of its own citizens without its consent. This case coupled with the eleventh amendment and cases construing that amendment[7] have had the effect of completely excluding from the jurisdiction of the federal courts actions by citizens against a state without its consent.

Claimants that have tried to sue in state courts have met with little more success. States usually handle claims against them in one of four ways: (1) The claimant may present a claim in the form of a private bill to the state legislature. The legislature may either authorize the claimant to bring suit in the state courts, or may grant relief itself

[4] The Federalist No. 81, at 567 (Dawson ed. 1873). Madison opined, "It is not in the power of individuals to call any state into court." 3 Elliot's Debates on the Federal Constitution 533 (2d ed. 1891).

[5] 2 U.S. (2 Dall.) 419 (1793).

[6] 134 U.S. 1 (1890). Accord O'Conner v. Slaker, 22 F.2d 147 (8th Cir. 1927).

[7] Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); Fitts v. McGhee, 172 U.S. 516 (1899); Riley v. Worchester County Trust Co., 89 F. 2d 59 (1st Cir. 1937); Dunnock v. Kansas State Highway Comm'n, 21 F. Supp. 882 (D.C. Kan. 1937).

by passing an appropriation bill.[8] (2) The claimant may present his claim to an administrative claims board.[9] This is the most frequently used method. Five states in their constitutions have provided for an administrative claims board.[10] Most of the remaining states have created such a board by statute.[11] (3) The claimant, after presenting his claim to an administrative claims board, may have a right to appeal to the courts from an adverse ruling of the board. At least eleven states by statute provide for such an appeal.[12] (4) A plaintiff may sue in the regular court system of the state or in a court of claims where one has been established. This, of course, may only be done where the state has consented to suit. States have been much more willing to consent to suit on their contracts than for their torts. At least four states, Illinois, New York, Vermont, and Washington, have consented to being sued directly in the court to determine their tort liability.[13] In two of these states, Illinois and New York, suit is brought in a court of claims sitting without a jury. At least fourteen states have by statute consented to suit on their contracts.[14] Also, courts have been much more

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8 In some states an act authorizing the claimant to sue the state is violative of a constitutional prohibition of "special laws." *E.g.*, Ind. Const. art. IV, § 24; Ore. Const. art. IV, § 24. A more complete discussion of legislative relief appears in Note, 25 Va. L. Rev. 437 (1939). For a criticism of legislative relief, see Note, 68 Harv. L. Rev. 506, 509 (1955).

9 See generally Note, 68 Harv. L. Rev. 506 (1955).

10 Idaho Const. art. IV, § 18; Mich. Const. art. VI, § 20; Mont. Const. art. VII, § 20; Nev. Const. art. V, § 21; Utah Const. art. VII, § 13.

11 *E.g.*, Ohio Rev. Code Ann. § 127.11 (Page Supp. 1965).

12 Ariz. Rev. Stat. Ann § 12-821 (1956); Cal. Gov't Code § 945.4; Iowa Code Ann. tit. 2, ch. 25A (Supp. 1965); Ky. Rev. Stat. § 44.140 (Baldwin 1963); Miss. Code Ann. § 4387 (1957); Nev. Rev. Stat. § 41.010 (Supp. 1965); N.C. Gen. Stat. § 143-307 (1964); Pa. Stat. Ann. tit. 72, § 1104 (Purdon Supp. 1965); S.D. Code § 33.0604 (Supp. 1960); Va. Code § 8-752 (Supp. 1966); Wis. Stat. Ann. § 285.01 (1958). Idaho has constitutional provisions which have been interpreted as allowing appeal from the state's administrative claims board. Idaho Const. art. IV, § 18, art. V, § 10. One court has stated in dictum that appeal may be had from a decision of an administrative claims board, just as from any administrative agency, unless appeal is specifically denied. Kaufman Const. Co. v. Holcomb, 357 Pa. 514, 55 A.2d 534 (1947).

13 Ill. Ann. Stat. ch. 37, § 439. 8(D) (Smith-Hurd Supp. 1965); N.Y. Ct. Cl. Act § 8; Vt. Stat. Ann. tit. 12, § 5601 (Supp. 1965); Wash. Rev. Code Ann. § 4.92.090 (Supp. 1965).

14 Ill. Ann. Stat. ch. 37, § 439.8(B) (Smith-Hurd Supp. 1965); Ind. Ann. Stat. § 4-1501 (Burns 1946); Mass. Ann. Laws ch. 258, § 1 (1956); Mich. Stat. Ann. § 27A.6419 (1962); Minn. Stat. Ann. § 3173 (Supp. 1965); Mont. Rev. Code Ann. § 83.601 (1966); Neb. Rev. Stat. § 24-324 (1964); N.H. Rev. Stat. Ann. § 491.8 (1955); N.Y. Ct. Cl. Act § 9; N.C. Const. art. IV, § 9; N.D. Cent. Code § 32-12-02 (1960); Ore. Rev. Stat. § 30.230 (1961); S.D. Code § 33.0604 (Supp. 1960); Wash. Rev. Code Ann. § 4.92.010 (Supp. 1965).

liberal in interpreting statutes consenting to suit on contracts than in interpreting statutes consenting to suit for tort.[15] In the absence of a statute, a number of courts have held that a state impliedly waives its immunity by entering into a contract.[16] The constitutions of four states, Alabama, Arkansas, Illinois, and West Virginia, provide that the state may never be made a defendant in a civil suit.[17] However, three of these states, Alabama, Arkansas, and West Virginia, have an administrative claims board,[18] and Illinois avoids the harshness of this constitutional provision by considering its court of claims to be not a part of the state's judiciary system.[19]

In the absence of legislation consenting to suit, some state courts have ameliorated the harshness of a strict application of the sovereign immunity rule by finding exceptions to it in certain circumstances. In some cases it has been held that certain state agencies do not partake of the state's immunity.[20] It is uniformly held that a mandamus action where proper is not a suit against the state, but is one against the office holder to compel him to perform his statutory duties.[21] Likewise, an equitable action to restrain a state officer from acting in violation of a statute or in excess of his powers is one against the individual and not the state.[22] It is held as a general rule that a suit against a state officer attacking the constitutionality of a statute of the state is not a suit against the state.[23]

In at least three situations, the courts have found a waiver of a

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15 Note, 40 Minn. L. Rev. 234, 251 (1956).

16 Ace Flying Service, Inc. v. Colorado Dept. of Ag., 136 Colo. 19, 314 P.2d 278 (1957); George & Lynch, Inc. v. State, —— Del. ——, 197 A.2d 734 (1964); Regents of University System of Georgia v. Blanton, 179 Ga. 210, 176 S.E. 673 (1934); Derby Road Bldg. Co. v. Commonwealth, 317 S.W.2d 891 (Ky. 1958); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. 1964);

17 Ala. Const. art. I, § 14; Ark. Const. art. V, § 20; Ill. Const. art. IV, § 26; W. Va. Const. art. VI, § 35.

18 Ala. Code tit. 55, § 333-34 (1960); Ark. Stat. Ann. § 13-1401 (1956); W. Va. Code Ann. § 1143 (1961).

19 47 Nw. U.L. Rev. 914, 915 (1953).

20 Maryland Cas. Co. v. State Highway Comm'n of Missouri, 256 F. Supp. 666 (W.D. C.D. 1966); Hoffmeyer v. Ohio Turnpike Comm'n, 83 Ohio L. Abs. 391, 166 N.E.2d 543 (1960); Grand River Dam Authority v. Grand-Hydro, 188 Okl. 506, 111 P.2d 488 (1941).

21 State *ex rel.* Cowan v. State Highway Comm'n, 195 Miss. 657, 13 So. 2d 614 (1943); Beronio v. Pension Comm'n, 130 N.J.L. 620, 33 A.2d 855 (1943).

22 Shellnut v. Arkansas State Game & Fish Comm'n, 222 Ark. 25, 258 S.W.2d 570 (1953); Reed v. McKeldin, 207 Md. 553, 115 A.2d 281 (1955).

23 White Eagle Oil & Ref. Co. v. Gunderson, 48 S.D. 608, 205 N.W. 614 (1925), Bonnett v. Vallier, 136 Wis. 193, 116 N.W. 885 (1908). Annot., 43 A.L.R. 408 (1926).

state's immunity: (1) by an appearance of the state in the case[24] (2) by a state officer where he has authority to waive the state's immunity[25] (3) by entering into a contract and thereby impliedly waiving the state's immunity.[26]

The supreme courts of some states, impatient with their legislature's failure to act, have not contented themselves with finding exceptions to or waivers of their state's immunity, but have abrogated sovereign immunity to varying degrees.[27] These courts generally state that they have a dual purpose in their ruling; to remedy the basic injustice of the sovereign immunity rule, and to "prod" their state legislature into affirmative action.

The federal government has been much more willing to give up its immunity from suit than the states have been. In 1885, the United States Court of Claims was established[28] with authority to hear claims against the government, but not including tort claims. This legislation has been several times modified and strengthened.[29] Where a claim is for less than 10,000 dollars, the federal district courts now have

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[24] Maxwell v. Shivers, —— Iowa ——, 133 N.W.2d 709 (1965); 39th-40th Corp. v. Port of New York Authority, 188 Misc. 657, 65 N.Y.S.2d 712 (1946).

[25] Dunn v. Schmid, 239 Minn. 559, 60 N.W.2d 14 (1953).

[26] *Supra* note 16.

[27] Stone v. Arizona State Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Ace Flying Service, Inc. v. Colorado Dep't of Ag., 136 Colo. 19, 314 P.2d 278 (1957); Boxberger v. State Highway Dept., 126 Colo. 438, 250 P.2d 1007 (1952); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Moliter v. Kaneland Community Unit Dist., 18 Ill.2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Holtz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). The courts that have abrogated sovereign immunity defend their right to make such a decision on the ground that it is a judge-made doctrine and may, therefore, be abolished by the courts. For a discussion of some of the recent cases abolishing sovereign immunity see, Lawton, "Disintegration of Governmental Immunity," 30 Ins. Counsel J. 251 (1963).

[28] Act of Feb. 24, 1885 Ch. 122, 10 Stat. 420.

[29] In 1863, this legislation was modified to give a decree of the Court of Claims the effect of a binding final judgment. Act. of March 3, 1863, Ch. 92, 12 Stat. 765. In 1887, the district courts were given concurrent jurisdiction with the Court of Claims of claims for less than $1,000, and the circuit courts were given concurrent jurisdiction of claims for more than $1,000 and less than $10,000. Tucker Act, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.). The latest amendment was in 1911. 36 Stat. 1093 (1911) 28 U.S.C. § 1346(A)(2)(1964). For a discussion of remedies under the Tucker Act see Note, 70 Harv. L. Rev. 829, 875-84 (1957).

concurrent jurisdiction with the Court of Claims.[30] Claims in excess of 10,000 dollars may only be presented to the Court of Claims in Washington, D.C. In 1946, the Federal Tort Claims Act was passed.[31] It provides that the federal government may be sued in tort in the district courts, and its liability established in substantially the same manner as a private citizen.[32] Most states lag far behind the federal government's exemplary progress. Even the countries of western Europe, the birthplace of sovereign immunity, have given up their immunity from suit in greater measure than the American states.[33]

Criticism of sovereign immunity in the United States dates back to the nineteenth century,[34] but did not become widespread until late in the 1920's.[35] Since then the flow of criticism from bench[36] and bar[37] has continued unabated. This criticism has not gone unheeded. Within the last ten years, significant progress has been made by statutory

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30 28 U.S.C. § 1346(A)(2) (1964).

31 Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

32 However, in a tort claim against the United States a jury is not allowed. 28 U.S.C. § 2402 (1964). Also, the United States did not consent to being held liable for all negligent conduct of its agents. The most notable area of non-liability is for "discretionary" acts.

33 Blachly & Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 Law & Contemp. Prob. 181 (1942); Setser, "The Immunities of the State and Government Economic Activities," 24 Law & Contemp. Prob. 291, 303-07 (1959).

34 Young, "Liability of Municipal Corporations for Negligence," 18 Am. L. Rev. 1008 (1884).

35 At that time Professor Borchard published a series of articles. Borchard, "Government Liability in Torts (pts. 1-3)," 34 Yale L.J. 1, 129, 229 (1924-25); Borchard, "Governmental Responsibility in Tort," 36 Yale L.J. 1039 (1927); Borchard, "Theories of Governmental Responsibility in Tort," 28 Colum. L. Rev. 734 (1928). In these articles Borchard argues that the sovereign immunity rule as applied in the United States cannot be justified as a matter of legal precedent or on public policy grounds.

36 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961); Boxberger v. State Highway Dept., 126 Colo. 438, 441, 250 P.2d 1007, 1008 (1952); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957). "Surely, with the passage of years, today's question (of abolition of sovereign immunity) is become a game of quasi-legal basketball with legislators and judges tossing the sphere back and forth with neither making visible effort to loop it for decisive result. It is time one branch or the other act affirmatively . . ." Williams v. City of Detroit, 364 Mich. 231, 273, 111 N.W.2d 1, 11 (1961).

37 One law review note estimates that over 200 articles and notes dealing with sovereign immunity have been written since the turn of the century. Note, 36 Ind. L.J. 223 (1961). Illustrative of these are; Borchard's articles *supra* note 35; Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1 (1963); James, "Tort Liability of Governmental Units and Their Officers," 22 U. Chi. L. Rev. 610 (1955); Leflar & Kantrowitz, "Tort Liability of the States," 29 N.Y.U.L. Rev. 1363 (1954); Note, 68 Harv. L. Rev. 506 (1955).

enactment and judicial fiat. However, Ohio has made no substantial changes in this area since the creation of the Sundry Claims Board in 1917.[38]

Sovereign Immunity Rule in Ohio

The Ohio Constitution provides:[39] "Suit may be brought against the state, in such courts and in such manner as may be provided by law." The same provision or a similar one appears in the constitutions of twenty states.[40] This provision has been uniformly interperted as not being self-executing,[41] and, therefore, unless the legislature makes some further provision by law, there is no remedy against the state.[42] Ohio has adopted the traditional common law rule that the state cannot be sued without its consent and this consent must be given by the legislature.[43] This rule poses two questions: (1) What constitutes a suit against the state? and (2) What constitutes consent to suit?

What Constitutes a Suit Against the State

The bar of sovereign immunity cannot be avoided by bringing an action nominally against a state official, where the liability sought to be established is that of the state.[44] There was a time when the courts would look merely to the parties of record to determine if the suit was one against the state,[45] but it is now well established that the courts will look behind the pleadings.[46] Bringing a suit against a state official does not automatically oust the court of jurisdiction,[47] nor does it

38 Ohio Rev. Code Ann. § 127.11 (Page Supp. 1965).

39 Ohio Const. art. 1, § 16.

40 *E.g.*, Ariz. Const. art. 4, pt. 2, § 18; Cal. Const. art. 20, § 6; Pa. Const. art. 1, § 22.

41 State *ex rel.* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82, *cert. denied*, 332 U.S. 817 (1947); Palumbo v. Industrial Comm., 140 Ohio St. 54, 42 N.E.2d 766 (1942); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

42 Wolf v. Ohio State University Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959); Dunn v. Brammer, 102 Ohio App. 89, 141 N.E.2d 193 (1956).

43 Palmer v. State, 18 Ohio Op. (n.s.) 609, 26 Ohio Dec. 563 (1916) *aff'd*, 96 Ohio St. 513, 118 N.E. 102 (1917), *error dismissed*, 248 U.S. 32 (1918); Dunn v. Brammer, *supra* note 42.

44 State *ex rel.* Williams v. Glander, *supra* note 41; Reed v. Timberman, 65 Ohio App. 182, 29 N.E.2d 446, *appeal dismissed*, 137 Ohio St. 524, 30 N.E.2d 993 (1940); State *ex rel.* Bd. of County Comm'rs v. Rhodes, 86 Ohio L. Abs. 390, 177 N.E.2d 557 (1960); Ley v. Kirtley, 5 Ohio N.P. (n.s.) 529, 18 Ohio Dec. 280 (1907).

45 Osborn v. Bank of United States, 22 U.S. (9 Wheat) 738 (1824).

46 State *ex rel.* Williams v. Glander, *supra* note 41; Reed v. Timberman, *supra* note 44; State *ex rel.* Bd. of County Comm'rs v. Rhodes, *supra* note 44.

47 Equitable relief may be had against a state official where the act he threatens to do is in violation of a statute or in excess of his powers, since such suits are considered to be against the individual and not against the state. Columbia L. Ins. Co. v.

automatically avoid the bar of sovereign immunity. The crucial factor in determining if the suit is one against the state is the nature of the relief demanded. Where a judgment for the plaintiff might control the action of the state or subject it to liability, the state is the real party in interest, and the suit is barred by the doctrine of sovereign immunity, even if the state is not a party of record.[48]

In a suit in which the plaintiff seeks money damages, the most important consideration in determining if a suit is one against the state is whether state funds will be required in paying the judgment. In *American Life & Accident Ins. Co. v. Jones*,[49] the court noted that the money sought was a refund of contributions previously paid into the unemployment fund.[50] In *State ex rel. Nixon v. Merrell*,[51] plaintiff subcontractor sought a writ of mandamus against the Director of Highways to compel him to pay money to the subcontractor instead of the prime contractor. In granting the writ, the court treated the state as merely a "stakeholder," and, therefore, the proceeding was not against the state. A similar argument was made in garnishment proceedings;[52] that is, no additional funds are required of the state, and the state is merely required to act as a stakeholder of the employees' wages. This argument was rejected, because the state could become liable if it wrongfully paid the wages to the employee in violation of the garnishment order.[53] In *Hoffmeyer v. Ohio Turnpike Commission*,[54] the court found that a suit against the Commission was not a suit against the state. The court considered the scheme of the authorizing legislation as a whole, and decided that the prevailing character of the

Hess, 28 Ohio App. 107, 162 N.E. 466 (1926), *aff'd*, 116 Ohio St. 416, 156 N.E. 504 (1927). A suit against a state official attacking the constitutionality of a statute under which he acts is not a suit against the state. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N.P. (n.s.) 566, 18 Ohio Dec. 261 (1907). Annot., 43 A.L.R. 408 (1926).

[48] State *ex rel.* Williams v. Glander, *supra* note 41; State *ex rel.* Bd. of County Comm'rs v. Rhodes, *supra* note 44.

[49] 152 Ohio St. 287, 89 N.E.2d 301 (1949).

[50] "As we have suggested, if the instant action were simply an action for the recovery of money there would be some plausibility in the argument that it was an action against the state and, therefore, not permitted." Id. at 296, 89 N.E.2d at 307.

[51] 126 Ohio St. 239, 185 N.E. 56 (1933). For a later opinion in this case, not relevant to present considerations, see 127 Ohio St. 72, 186 N.E. 806 (1933).

[52] Palumbo v. Industrial Comm'n, *supra* note 41.

[53] Subsequent to the decision in *Palumbo*, a statute was enacted providing that a creditor may maintain a garnishment proceeding against the state. Ohio Rev. Code Ann. § 115.46 (Page 1954). For an interpretation of this statute, see 1959 Ohio Att'y Gen. Ops. 923.

[54] 83 Ohio L. Abs. 391, 166 N.E.2d 543 (1960). For a discussion of this case in the context of a comment urging the creation of a "competitive business activity" distinction in suits against the state, see Comment, 21 Ohio St. L.J.648, 659 (1960).

Commission was more in the nature of a separate entity engaged in a private undertaking than an arm of the government engaged in a governmental function. "The test used to determine entity and, therefore, liability is whether or not state funds would be subject to the payment of the judgment in the event the Commission is found liable."[55] In *Wolf v. Ohio State University Hospital*,[56] the court found the hospital to be an arm of the state and immune from suit because it operated out of the General Fund of Ohio and had no independent revenues with which to pay a judgment.

The sovereign immunity rule does not afford immunity to an officer where a mandamus action[57] is instituted against him to compel performance of a duty imposed by law.[58] Mandamus is regarded as a personal action against the state officer instead of an action in rem directed against the office.[59] However, the remedy of mandamus is granted only in very limited circumstances. The following limitations have been placed upon the remedy of mandamus at one time or another by the Ohio courts: a writ of mandamus will not issue unless the relator clearly shows his right to relief;[60] a writ of mandamus will not issue to compel the payment of a claim which is not liquidated in amount;[61] a writ of mandamus will not issue where the relator has another adequate remedy in the ordinary course of law;[62] a writ of mandamus will not issue to control the discretion of a state official;[63] a writ of mandamus will not issue where the relator seeks enforcement of a

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[55] *Id.* at 393, 166 N.E.2d at 545.

[56] *Supra* note 42.

[57] Mandamus actions are authorized and governed in Ohio by Ohio Rev. Code Ann. §§ 2731.01-2731.16 (Page 1954).

[58] State *ex rel.* Nichols v. Gregory, 130 Ohio St. 165, 198 N.E. 182 (1935); Shade v. Ferguson, 44 Ohio L. Abs. 332, 62 N.E.2d 642 (1945).

[59] Caledonian Coal Co. v. Baker, 196 U.S. 432 (1905); State *ex rel.* McCabe v. Industrial Comm'n, 132 Ohio St. 647, 9 N.E.2d 691 (1937).

[60] State *ex rel.* Libbey-Owens-Ford Glass Co. v. Industrial Comm'n, 162 Ohio St. 302, 123 N.E.2d 23 (1954); State *ex rel.* Coen v. Industrial Comm'n, 126 Ohio St. 550, 186 N.E. 398 (1933); State *ex rel.* Van Harlingen v. Bd. of Education, 104 Ohio St. 360, 136 N.E. 196 (1922).

[61] State *ex rel.* Barbourak v. Hunston, 173 Ohio St. 295, 181 N.E.2d 894 (1962); Williams v. State *ex rel.* Gribben, 127 Ohio St. 398, 188 N.E. 654 (1933).

[62] Ohio Rev. Code Ann. § 2731.05 (Page 1954); State *ex rel.* Sibarco Corp. v. Hicks, 177 Ohio St. 81, 202 N.E.2d 615 (1964); State *ex rel.* Adams v. Rockwell, 167 Ohio St. 15, 145 N.E.2d 665 (1957); State, *ex rel.* Rickets v. Balsly, 112 Ohio App. 555, 171 N.E.2d 538 (1960).

[63] State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40 (1962), *cert. denied*, 373 U.S. 911 (1963); State *ex rel.* Toledo-Maumee Raceways, Inc. v. Ohio State Racing Comm'n, 172 Ohio St. 109, 173 N.E.2d 347 (1961); State *ex rel.* Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952).

private right, and there is no question of official duty involved.[64] The difficulty of fitting within the many restrictions placed on the remedy of mandamus, the broad discretion conferred on most public officials, the difficulty of showing a clear statutory duty, and the unlikelihood that damages will be liquidated make mandamus a remedy seldom available.

If the state is the real party in interest, whether nominally a party or not, the form in which the action is cast will not avoid the total defect of lack of consent of the state to suit. Thus an action in mandamus or for a declaratory judgment will not avoid the bar of sovereign immunity if the state is the real party in interest.[65]

WHAT CONSTITUTES CONSENT TO SUIT

It is a rule of construction in Ohio and elsewhere that statutes in derogation of common law are to be strictly construed.[66] Since a statute giving consent to sue the state is in derogation of the common law doctrine of sovereign immunity, the Ohio courts have refused to find consent in the absence of clear and express language to that effect in the code.

In *Wolf v. Ohio State University Hospital*[67] the court refused to find consent to suit where the code provided[68] that the Board of Trustees of the Ohio State University were empowered to "sue and be sued." The court reasoned that since this section did not provide in what courts and in what manner suit could be brought against the Board, it was not the intention of the legislature to consent to suits being brought. Furthermore, the code provision establishing the powers of the Board of Trustees was enacted in 1870, and the section of the

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64 Ohio Rev. Code Ann. § 2731.01 (Page 1954); State *ex rel.* Spellmire v. Kauer, 173 Ohio St. 279, 181 N.E.2d 695 (1962); State *ex rel.* Joseph v. Crossland, 152 Ohio St. 199, 88 N.E.2d 289 (1949); State *ex rel.* Cope v. Cooper, 122 Ohio St. 321, 171 N.E. 399 (1930).

65 West Park Shopping Center, Inc. v. Masheter, 6 Ohio St. 2d 142, 216 N.E.2d 761 (1966) (declaratory judgment). State *ex rel.* Wilson v. Preston, 173 Ohio St. 203, 181 N.E.2d 31 (1962) (mandamus).

66 "Statutes which grant the privilege of suing the state or its political subdivisions are in derogation of the common law and are therefore to be strictly construed, and are not to be enlarged unless that purpose and intent is plainly and unequivocally indicated by subsequent legislation." Ray v. Trenton Twp., 49 Ohio App. 172, 18 Ohio L. Abs. 652, 195 N.E. 707 (1934). A similar rule prevails in most states. See, *e.g.*, Miller v. Pillsbury, 164 Cal. 199, 128 Pac. 327 (1912); Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920); Daley v. Unemployment Comp. Bd., 140 Pa. Super. 203 (1940); Automobile Sales Co. v. Johnson, 174 Tenn. 38, 122 S.W.2d 453, 120 A.L.R. 370 (1938).

67 *Supra* note 42.

68 Ohio Rev. Code Ann. § 3335.03 (Page 1954).

constitution,[69] providing that the state may be sued in such manner and courts as may be provided by law, was enacted in 1912. Hence, the statute obviously was not enacted pursuant to the constitutional provision, and according to its terms the constitutional provision is not self executing.

The Ohio courts have repeatedly refused to find a consent to suit by waiver or by implication. A state officer cannot waive the state's immunity by entering an appearance for the state.[70] Also, the Attorney General has no inherent authority to agree to payment by the state of an indebtedness due the county, and in effect consent to an action by the board of county commissioners against the state.[71] Likewise, the Director of Highways has no authority to agree to pay damages for breach of a contract he has entered into in the state's behalf.[72] It has been argued that a statute[73] providing that the Director of Highways may not be sued in any court outside of Franklin County impliedly consents to suit in Franklin County. The court held that this section merely established the venue of the action, and did not undertake to create statutory liability.[74] In short, the Ohio courts have taken a very narrow view of what constitutes consent to suit. The state may only be sued in accordance with legislation which clearly expresses the state's consent to suit.[75]

Consent to suit has been granted in piecemeal fashion in Ohio. These consent-to-suit statutes are scattered throughout the code.[76]

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[69] Ohio Const. art. I, § 16.

[70] Reed v. Timberman, *supra* note 44.

[71] State *ex rel.* Bd. of County Comm'rs v. Rhodes, *supra* note 44.

[72] 1954 Ohio Att'y Gen. Ops. 700.

[73] Ohio Rev. Code Ann. § 5501.18 (Page 1954).

[74] Providence Washington Ins. Co. v. Garrettsville, 67 Ohio L. Abs. 370, 120 N.E.2d 501 (1953).

[75] Palmer v. State, *supra* note 43; Dunn v. Brammer, *supra* note 42.

[76] The following listing of consent-to-suit statutes, though not exhaustive, is fairly complete.

Consent to sue the state.—The state may be made a party to a proceeding to sell real estate in which it has a claim, Ohio Rev. Code Ann. § 5301.24 (Page 1954); appeal to a court of common pleas from an adverse ruling of an administrative agency is allowed in certain circumstances, Ohio Rev. Code Ann. §§ 119.12, 123.16.1 (Page 1965); the Director of Highways may be sued in a condemnation proceeding if the landowner follows the procedures outlined in the code, Ohio Rev. Code Ann. § 5519.01 (Page 1954); a creditor may maintain a garnishment proceeding against the state, Ohio Rev. Code Ann. § 115.46 (Page 1954); an action against the state may be maintained for the recovery of fees paid under protest to the Secretary of State, Ohio Rev. Code Ann. § 111.19 (Page 1954); suit may be brought against the state to recover on water conservation bonds, Ohio Rev. Code Ann. § 1523.10 (Page 1954).

Consent to sue counties.—The board of county commissioners is liable in its official

Noticeably absent from any listing of statutes in which the General Assembly has given consent to suit is any provision for suit against the state on its contracts or for its torts.

OHIO CLAIMS PROCEDURE

As to most matters, the state of Ohio has chosen not to have its liability determined in a court of law. Instead, the General Assembly in 1917 established the Sundry Claims Board.[77] By establishing this board the General Assembly has served notice that it does not ascribe to the maxim, "The King can do no wrong." Ohio is not immune from doing wrong, it is immune from suit. The Board has three main functions: (1) to receive and investigate claims, (2) to hear and decide claims, and (3) to make recommendations to the General Assembly.

The Board has limited its jurisdiction to those cases in which no other form of remedy has been established by the state statutes. Thus, a damage claim for breach of a contract entered into on behalf of the state by the Director of Highways can only be brought to the

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capacity for damages received by reason of its negligence in not keeping a road or bridge in repair, Ohio Rev. Code Ann. § 305.12 (Page 1954); a person taken from officers of justice by a mob and assaulted may recover up to $1,000, Ohio Rev. Code Ann. § 3761.02 (Page 1954); the legal representative of a person who dies from injuries received from lynching by a mob may recover up to $5,000, Ohio Rev. Code Ann. § 3761.04 (Page 1954); appeal to the probate court may be had from an adverse ruling by the commissioners on a claim for damages to livestock injured by a dog, Ohio Rev. Code Ann. §§ 955.29, 955.37 (Page 1954); a person may recover up to $200 for medical expenses as a result of being bitten by a rabied dog, Ohio Rev. Code Ann. §§ 955.41.-.42 (Page 1954).

Consent to sue a municipality.—A municipality is liable for injury to person or property caused by the negligent operation of a motor vehicle, with the exception of the police and fire departments while engaged in their official duties, Ohio Rev. Code Ann. § 701.02 (Page 1954).

Consent to sue a township.—"Each board of township trustees shall be liable, in its official capacity, for damages received by any person, firm or corporation by reason of the negligence or carelessness of such board in the discharge of its official duties." Ohio Rev. Code Ann. § 5571.10 (Page 1954). The statutory liability of the township trustees created by this section is probably limited to roads, road machinery, or equipment used with relation to roads since it is a part of title 55, Ohio's highway code.

Consent to sue a board of education.—"The Board of Education of each school district shall be a body politic and corporate, and as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property . . ." Ohio Rev. Code Ann § 3313.17 (Page 1954).

[77] Ohio Rev. Code Ann. § 127.11 (Page Supp. 1965). See generally Stock, "Sundry Claims," 1965 Reference Manual of the Ohio Legal Center Institute XII; Walsh, "The Ohio Sundry Claims Board," 9 Ohio St. L.J. 437 (1948).

Sundry Claims Board, since the state has not consented to be sued on its contracts.[78]

The procedure before the Board is not complicated. Claimants may be represented by counsel, but in about one-half of the cases they are not. Frequently, the claimants themselves choose not to appear. The actual hearing is conducted in an informal manner. In fact, the atmosphere of a judicial proceeding is completely lacking in most cases. After hearing a claim, the Board may approve the claim, disapprove the claim, or approve the claim with conditions or limitations.

There is no provision for appeal or review of a decision of the Sundry Claims Board. This is probably because the findings of the Board serve only as a recommendation to the General Assembly, and a determination by a court would be of no more binding effect on the General Assembly.

In deciding claims against the state, the test applied by the Board is whether or not the claimant has stated and proved what would be a good cause of action against a private litigant in a court of law. Obviously, the best place to determine this question is in a court of law. Surely, the General Assembly by establishing a Sundry Claims Board did not intend to assert that the Board is better qualified than a court of law to determine liability. What the legislature did intend to do was limit the size of damage awards granted by juries. It is generally conceded that juries will dig more deeply into a "long pocket," and who has a longer pocket than the state? It is probably for this reason that four of the five members of the Board are also financial officers of the state.[79]

The legislature's argument goes like this. The state provides a number of very valuable services. As an inevitable consequence, a few private parties are injured. To allow a suit against the state at the instance of each of the aggrieved parties, and to allow a jury to set the damages might place an intolerable burden on the state's economy and halt the flow of these valuable state services. Balancing the interests, it is more in the public welfare to have the benefit of the state's services than to allow a few injured plaintiffs their day in court.

Instead the legislature has established the Sundry Claims Board. Through this Board, the claimant is allowed some redress for his grievances, and at the same time the state is assured that it will be

[78] 1954 Ohio Att'y Gen. Ops. 700.

[79] The Sundry Claims Board is composed of five members: The Director of Finance, the Auditor of State, the Chairman of the House Finance Committee, the Chairman of the Senate Finance Committee, and the Attorney General.

able to continue providing its services without fear of large money demands through lawsuits.

The General Assembly's fiscal-mindedness is commendable. However, what little statistical data is available indicates that their fears are unfounded.[80] After New York consented to having its liability determined in the same manner as a private citizen, no intolerable burden on the state's economy was experienced.[81] Illinois has had a similar experience.[82]

A Modest Proposal

With the increase of government contact with the individual, sovereign immunity has been increasingly questioned. Courts and legislatures have been quicker to do away with immunity from suit in contract than in tort.[83] By the turn of the century, several states and the federal government had already given up their immunity from suit on their contracts.[84] This is a step long overdue in Ohio. There is good reason for a state to be more willing to surrender its immunity in contract than tort.

A tort is usually an accidental relationship. Frequently, the parties have nothing more in common than the fact that they ran their vehicles together in an intersection. The number of torts for which a state could be held responsible is not predictable. Consequently, the demands on the treasury are not foreseeable. It is this uncertainty which is the cause of the General Assembly's reluctance to do away with its sovereign immunity.

No matter what validity this argument possesses as applied to a tort claim, it does not apply to a contract claim. A contract is a consensual relationship. The parties are aware of one another's identity and frequently deal face to face. The state has absolute control over how many contracts it enters into.[85] Because of this, the state has con-

[80] Note, 68 Harv. L. Rev. 506, 517 (1955).

[81] MacDonald, "The Administration of a Tort Liability Law in New York," 9 Law & Contemp. Prob. 262, 280 (1942).

[82] Comment, 47 Nw. U.L. Rev. 914, 917 (1953).

[83] Note, 40 Minn. L. Rev. 234, 251 (1956).

[84] The federal government did away with its immunity from suit on its contracts in 1855, *supra* note 8; Indiana in 1889, Ind. Acts, ch. 128, § 1 (1889); North Dakota in 1895, N.D. Rev. Code, § 5929 (1895).

[85] "No officer, board, or commission of the state shall enter into any contract . . . unless the director of finance first certifies that there is a balance in the appropriation, not otherwise obligated to pay precedent obligations, pursuant to which such obligation is required to be paid." Ohio Rev. Code Ann. § 131.17 (Page 1954). The above provision is mandatory. State *ex rel.* Miller v. Guthery, 125 Ohio St. 603, 183 N.E. 781 (1932); State *ex rel.* S. Monroe & Co. v. Baker, 112 Ohio St. 356, 147 N.E. 501 (1925).

trol over the demands on the state treasury by parties claiming the state has breached a contract. One who deals with an officer or agent of the state must, at this peril, ascertain the nature and extent of the powers of such officer or agent.[86] If an officer or agent enters into a contract beyond his express authority, the contract is void or at least voidable by the state.[87] If the officer or agent has apparent authority but no express authority, the contract will likewise be void.[88] Under such circumstances it is virtually impossible for the state to be burdened with unforeseen contractual obligations.

A tortfeasor takes his victim as he finds him. The damages allowable for loss of a finger will depend on whose finger was lost. A concert pianist may be given a substantial sum for loss of earnings, whereas, a plaintiff not required to use his fingers in his work may recover nothing for loss of earnings. This uncertainty as to the elements of a damage award has caused the General Assembly to be reluctant to surrender its immunity from suit in tort.

However, a breach of contract case does not produce the same problems. The plaintiff can only recover for those damages that were contemplated by the parties or were reasonably foreseeable at the time the contract was made. The plaintiff may suffer additional damages, but for these he can have no recovery.

The measure of damages in a tort case is necessarily somewhat inexact. Such items as pain and suffering, loss of consortium, mental anguish, and loss of future earnings, are not capable of precise measurement. In such a case, the jury is allowed a great deal of latitude in determining the dollar amount of an award. This latitude coupled with the state's "long pocket" could produce excessive damage awards against the state. This possibility is anathema to the General Assembly, and it is for this reason that the Sundry Claims Board was established.

The jury is not allowed as much latitude in setting damages in a breach of contract case as in a tort case. The parties to a contract make

"An officer or agent of the state . . . shall make no contract binding or purporting to bind the state . . . to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he is personally liable thereon and the state . . . shall not be liable thereon." Ohio Rev. Code Ann. § 3.12 (Page 1954).

86 Allen v. Lutz, 111 Ohio St. 333, 145 N.E. 483 (1924), *error dismissed,* 273 U.S. 654 (1927); J.S. Bradley Co. v. Squire, 65 Ohio App. 186, 29 N.E.2d 430 (1939).

87 Webster v. Clear, 49 Ohio St. 392 (1892); Roseberry v. Hollister, 4 Ohio St. 297 (1854); McBroom v. Watkins, 11 Ohio N.P. (n.s.) 337, 21 Ohio Dec. 505, *error dismissed,* 10 Ohio L. Rep. 24 (1911); 1957 Ohio Att'y Gen. Ops. 418.

88 State v. Lake Shore & M.S.R. Co., 1 Ohio N.P. 292, 2 Ohio Dec. 300 (1895).

mutual promises, and it is for breach of these only that recovery may be had. The contract itself provides the measure of damages. If the state breaches a contract for the purchase of equipment, the vendor's measure of damages is the difference between the contract price and the market price. If the state breaches an employment contract, the measure of damages is the contract rate less what the employee could have made or did make by other employment. If the state breaches a construction contract, the contractor's measure of damages is the contract price less the savings to the contractor by not having to complete the contract. In all of these cases, damages can be determined with substantial accuracy. The amount of damages does not depend on some imponderable, like mental anguish, but can be determined by looking at the contract price and comparing this with some relatively fixed standard, such as market value, custom, or established experience. Where it appears at the time the contract is entered into that the amount of damages will be difficult to predict, a liquidated damage clause may be inserted. If this clause is a good faith attempt to arrive at a damage estimate and is not a penalty, it will serve as a limit on the damages recoverable.

Sovereign immunity has never been in tune with American notions of responsible government. The basic argument for its retention is financial necessity. But why is it necessary that the State of Ohio be legally free from the obligations it assumes by solemnly entering into a contract? When Ohio enters into a contract with a private citizen, it promises him the benefit of its performance. However, if the citizen seeks to enforce his contract, the state enters the defense of nonsuability. All parties to every contract should have the right to have a court of law determine who is in error when a dispute arises. State officers are not equipped to engage in this function which is historically and inherently that of the judiciary. Neither are they elected with this function in mind.

A criticism often leveled at administrative claims boards is that their awards are strongly influenced by political pressures.[89] By transferring the power to hear cases to the judiciary, all beliefs that an award is a gift or a matter of politics are destroyed. Eliminating contract claims from the jurisdiction of the Sundry Claims Board would have the added benefit of lightening the work load of the already overburdened public officials who are members of the Board,[90] and would

89 Oberst, "The Board of Claims Act of 1950," 39 Ky. L.J. 35, 41 (1950); Note, 44 Harv. L. Rev. 432, 435 (1931).

90 The members of the Sundry Claims Board are also members of the State Controlling Board and the Emergency Board.

permit a more thorough consideration of those claims remaining within the Board's jurisdiction.

Why should the proposed change come from the legislature and not the courts? The sovereign immunity rule is so firmly entrenched in Ohio jurisprudence that it is too much to hope that the Ohio Supreme Court will overrule the multitude of cases that has accumulated. The Ohio Supreme Court has continually and quite recently referred this problem to the legislature.[91] The supreme courts of some states, impatient with their legislatures' failure to act, have abrogated sovereign immunity to varying degrees.[92] However, the General Assembly is the better forum in which to bring about such a change.[93] A court of law deals with one case at a time. In formulating a rule it is limited by the "narrowly confined factual context of a specific lawsuit."[94] A court pronouncement that sovereign immunity is abolished as to contract claims would create more problems than it would solve. Many important questions would be left unanswered: What courts have jurisdiction of a contract claim against the state? Where is the venue of such a claim to be set? Will the statute of limitations apply to contract claims against the state? Upon whom should service of process be made? Must a claim first be filed with the department involved before suit can be brought? These questions are best answered by the General Assembly in a comprehensive piece of legislation. The General Assembly can conduct extensive research through its committees or through the Legislative Research Commission. California has made good use of the research commission approach.[95] It should be noted that any statute surrendering the state's immunity should clearly express the legislature's intent.[96] If the statute is at all ambiguous it may

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[91] Hack v. Salem, 174 Ohio St. 383, 384, 189 N.E.2d 857, 858 (1963).

[92] See Lawton, "Disintegration of Governmental Immunity," 30 Ins. Counsel J. 251 (1963).

[93] Van Alstyne, "Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu," 15 Stan. L. Rev. 163 (1963).

[94] *Id.* at 163.

[95] California Law Revision Commission, Sovereign Immunity Study (1963); Van Alstyne, California Government Tort Liability (1964). The California Law Revision Commission met almost continually for two years before making its report. The result is a detailed and workable scheme of bringing claims against the state. One noted author has praised the Commission's work in the following words: "Although these documents are focused on California, the thinking will be of great usefulness to all states confronted with the problem of sovereign responsibility. The quality of the California studies is very high, and they push forward the frontiers of understanding." 3 Davis, Administrative Law Treatise (Supp. 1965, § 25.17).

[96] Some courts have reached ludicrous results where the statute creating a governmental unit also provides that the unit may "sue and be sued." Such clauses have

be construed in a manner inconsistent with legislative intent because statutes in derogation of common law are strictly construed.

As federal programs continue to expand, state citizens are with increasing regularity looking to the federal government when in need of aid. Any move to foster more respect to the state would be beneficial. Enacting legislation such as here proposed would point out to the citizens of Ohio that their government recognizes its responsibility to submit itself to legal process the same as its citizens.

The only rational argument for retention of the sovereign immunity rule is that it is a "necessary evil." At least as to contract claims, immunity is not necessary, but it is an evil.

It would seem that abolition of sovereign immunity is inevitable. If this archaic doctrine is to meet its end, abolition of immunity from suit in contract is the logical starting point.

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been interpreted as merely waiving the government's immunity from suit, but not waiving its immunity from liability. As pointed out by one commentator, this entitles the plaintiff to a free trip to the courthouse. See Leflar & Kantrowitz, "Tort Liability of the States," 29 N.Y.U.L. Rev. 1363, 1408 (1954). Ohio reached such a result in Wolf v. Ohio State University Hosp. 170 Ohio St. 49, 162 N.E.2d 475 (1959).